



Liar, Liar, Ship on Fire, Now What?

Recovery Perspective

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Liar, Liar, Ship on Fire, Now What?

I. RECOVERY TACTICS

A. SUE EVERYONE

B. FOCUS TODAY IS ON CARRIER'S LIABILITY – SEAWORTHINESS

1. HAGUE

2. COGSA

3. ROTTERDAM RULES ?

4. WHAT HAVE COURTS ALREADY RULED ON THE TOPIC

5. APPLYING RULINGS TO THE FACTS KNOWN

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II. LAW

A. HAGUE RULES

ARTICLE III – RESPONSIBILITIES AND LIABILITIES

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(a) make the ship seaworthy;...

ARTICLE IV – RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, ...

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this article.

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II. LAW

B. CARRIAGE OF GOODS BY SEA ACT

Section 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to –

(a) Make the ship seaworthy;...

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II. LAW

B. CARRIAGE OF GOODS BY SEA ACT

Section 1304. Rights and immunities of carrier and ship

(1) Unseaworthiness

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this Appendix. Whenever the loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(b) fire, unless caused by the actual fault or privity of the carrier

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II. LAW

C. ROTTERDAM RULES

Under the Rotterdam Rules the carrier is liable for any loss or damage caused by unseaworthiness where the carrier did not exercise due diligence throughout the voyage and at all times the goods are in the constructive custody of the carrier and its subcontractors. Article 14.

“The carrier is bound before, at the beginning of, and during the voyage to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage;
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.”

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III. COURT DECISION

ALIZE DECISION ADMIRALTY HIGH COURT OF JUSTICE March 8, 2019

FACTS:

On May 17, 2011 the CMA CGM LIBRA, grounded whilst leaving the port of Xiamen, China.

Owners claimed the cause of the casualty was an uncharted shoal.

Cargo interests claimed the cause of the casualty was the unseaworthiness of the vessel which lead to the Master's negligent navigation of the vessel.

In particular, cargo claimed that the vessel had an inadequate passage plan, and that the particular inadequacy caused the casualty and that due diligence was not exercised to make the vessel seaworthy.

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III. COURT DECISION

ALIZE DECISION

COURT'S CONCLUSION:

The vessel was unseaworthy before and at the beginning of the voyage from Xiamen because it carried a defective passage plan. That defective passage plan was causative of the grounding of the vessel. Due diligence to make the vessel seaworthy was not exercised by the Owners because the master and second officer failed to exercise reasonable skill and care when preparing the passage plan.

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III. COURT DECISION

ALIZE DECISION

COURT DESCRIPTION OF BURDEN OF PROOF

The Court applied the conventional view, that is, the burden lies with the Cargo Interests to establish that the vessel was unseaworthy and that such unseaworthiness caused the grounding. The Court said if those matters are established then the burden lies on the Owners to establish that due diligence was exercised to make the vessel seaworthy.

The Court found that neither the passage plan nor the chart contained the necessary warning regarding the shoals. It was therefore defective or inadequate and imprudently so because a source of danger when leaving Xiamen was not clearly marked as it ought to have been.

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III. COURT DECISION

ALIZE DECISION

COURT DISCUSSION OF UNSEAWORTHINESS

The Court stated that the usual test of unseaworthiness is whether a prudent owner would have required the relevant defect, had he known of it, to be made good before sending his ship to sea.

Counsel for the Owners argued that, “a defective passage does not itself make a ship unseaworthy. A ship may be unseaworthy because there was not on board the vessel the means and material for a proper passage plan to be drawn up, but the negligent preparation by the crew of a defective passage plan is not an element of seaworthiness.” They claimed that passage planning is part of navigation and not itself an aspect of unseaworthiness.

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III. COURT DECISION

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COURT DISCUSSION OF UNSEAWORTHINESS

The Court's response was that, 'as stated in the IMO Resolution of 1999, a "well planned voyage" is of "essential importance for safety of life at sea, safety of navigation and protection of the marine environment" one would expect that the prudent owner, if he had known that his vessel was about to commence on a voyage with a defective passage plan, would have required the defect to be made good before the vessel set out to sea....

The Court agreed that, "passage planning is 'the preparation' for safe navigation. However, it does not follow that 'passage planning itself is not an aspect of seaworthiness."

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III. COURT DECISION

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COURT DISCUSSION OF UNSEAWORTHINESS

The Court further stated that, ‘I am therefore unable to accept the submission that a one-off defective passage plan cannot amount to unseaworthiness....Furthermore, whilst the lack of proper systems can render a vessel unseaworthy, counsel’s submission, by concentrating upon the carrier’s own actions to the exclusion of those servants or agents, confuses the issue of seaworthiness with the issue of due diligence, which is a non-delegable duty.

In response to Owner’s position that there was no previous case that held a defective passage plan rendered a vessel unseaworthy, the Court responded- “But just as the standard of seaworthiness may rise with improved knowledge of shipbuilding (see *Scrutton* at paragraph 7-205) so may the standard of seaworthiness rise with improved knowledge of the documents required to be prepared prior to a voyage to ensure, so far as reasonably possible, that the vessel is safely navigated.”

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III. COURT DECISION

ALIZE DECISION

DUE DILIGENCE

Next the court tackled the issue of ‘Due Diligence’. The Court again referred to *Scrutton* at paragraph 14-046:

“The due diligence required is due diligence in the work itself by the carrier and all persons, whether servants or agents or independent contractors whom he employs or engages in the task of making the ship seaworthy; the carrier does not therefore discharge the burden of proving that due diligence has been exercised by proof that he engaged competent experts to perform and supervise the task of making the ship seaworthy. The statute imposes an inescapable personal obligation.”

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III. COURT DECISION

ALIZE DECISION

DUE DILIGENCE

Citing to earlier decisions, the court noted that they held the carrier will therefore be responsible for negligence of those whom it delegates due diligence. The question is whether the unseaworthiness is due to lack of diligence in those who have been implicated by the carrier in the work of keeping or making the vessel seaworthy. Such persons are the carrier's agents whose diligence or lack of it is attributable to the carrier.

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III. COURT DECISION

ALIZE DECISION

DUE DILIGENCE

The Court cited to *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255 (negligence by the master and the cargo officer in stowing certain cargo below deck, see pp 266-267); *The Cape Bonny* [2018] 1 Lloyd's Rep 15 (failure by the chief engineer and the first assistant engineer to carry out proper checks and measurements, see paragraphs 126 and 154).

The *Kapitan* is an interesting decision because the initial explosion originated in a container of un-manifested dangerous cargo carried on deck. This loss took place in July, 1993.

Containerized cargoes from various locations in Europe, America and the Far East were loaded on the feeder vessel *Kapitan Sakharov* in Khorfakkan in July 1993 for delivery to Dubai and Kuwait.

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III. COURT DECISION

The KAPITAN SAKHAROV

A day after leaving Khorfakkan, an explosion from the container on deck killed two crew members. A subsequent fire occurred which resulted in the vessel sinking; however, the court found the sinking was due to the fact that the below cargo that should have not been stowed underdeck, and that was the cause of the fire that resulted in the sinking.

Two carriers had issued bills of lading for the cargoes onboard the feeder vessel. The owner of the vessel sued the carriers as shippers arguing that the un-manifested cargo caused the initial explosion.

No one was able to locate the parties that shipped the un-manifested cargo and there was a question of whether it had been tampered with prior to shipment.

The court found that the Vessel owner was not liable to innocent cargo interests because the “Owners **could not have found out** about the un-manifested cargo and had therefore exercised due diligence.

Would the same apply today- how important is the fact it is the owner of the feeder vessel who brought the action.

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IV. DECISION MAKING

The lack of specific statutory definitions forces courts to define seaworthiness on a case-by-case basis. Attempting to give substance to the definition of seaworthiness, courts established:

- (1) the non-delegable and absoluteness of the duty;
- (2) the requirements of seaworthiness in relation to the vessel;
- (3) the requirements of seaworthiness in relation to its officers, crew and offshore personnel;
- (4) the need for evaluating seaworthiness based on the time and place of use of the vessel.

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IV. DECISION MAKING

Seaworthiness is a relative state and not necessarily an absolute one. See *Lemar Towing Co. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652 (E.D. La. 1972), *affd*, 471 F.2d 609 (5th Cir. 1973); *Smith v. Northwestern Fire & Marine Ins. Co.*, 159 N.E. 87 (N.Y. 1927) Seaworthiness is often determined by how the vessel is used and the place of its use. The question of seaworthiness is therefore best viewed in light of the "usages of the port where the vessel is fitted out, in reference to the destined voyage,' the nature of the voyage itself. See *Wilmering v. Lexington Ins. Co.*, 678 S.W.2d 865 (Mo. Ct. App. 1984). Unseaworthiness may occur when the unsafe condition is only temporary or transitory. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *Dos Santos v. Ajax Navigation Corp.*, 532 So. 2d 231 (Fl. App. 1988). Thus, a hazard may be of short duration or recent vintage, yet nevertheless constitute unseaworthiness. See *Shenker v. United States*, 322 F.2d 622 (2d Cir. 1963); *Puddu v. Royal Neth. S.S. Co.*, 303 F.2d 752 (2d Cir. 1962). The absence of crucial equipment, such as adequate safety equipment, may also constitute unseaworthiness."

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V. FACTUAL SETTING

1. Ship fires occur about once every 60 days. Fire activity increased in 2018 and the beginning of 2019 had its share of fires.
2. On board firefighting capability on larger vessels alone are not adequate to put out fires.
3. Larger new vessels continue to role out with 20,000 TEU units and expected 25,000 TEU units.
4. Cargo Incident Notification System(CINS) created in 2011 to develop increase safety in supply chain and reduce the number of cargo incidences on board ships.
5. Hazardous shipments are charged higher freight rates.
6. Slot chartering is in place. NVOCC's are shippers.
7. Software has been developed to cull mis-declared cargoes. Some more sophisticated than others.
8. Fines/Penalties/Surcharges being assessed by certain carriers.

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V. FACTUAL SETTING

9. Carriers require Shippers of Non-Hazardous cargo to tick a box saying so.
10. OOCL says 5-10% of containership cargo is declared dangerous goods, but the extent of mis-declaring is impossible to tell.
12. Chinese economy is slowing down.
13. Vessel Owners need to fill their ever increasing-in-size ships.
14. Potential accumulation catastrophe for innocent cargo underwriter is waiting to happen.

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VI. FINES/PENALTIES/SURCHARGE

1. If the parties responsible for the mis-declared hazardous cargoes are rogue shippers what actual impact will it have?
2. Once found out, will the rogue shipper actually pay the fine or merely take their mis-declared cargo elsewhere?
3. Will these rogue shipper's re-establish themselves as another company with a new name, address?
4. If the reasoning behind the mis-declaration is to avoid paying the higher freight rate will the imposition of a fine compel them to do so?
5. Will it drive them to forwarders and/or carriers that do not impose fines and have more lax security- which may still end up on the vessel owned by the carrier imposing the fine through a slot chartering arrangement or otherwise?
6. How many times is a shipper allowed to get caught before they are banned or will they never be banned?
7. If caught, will the carrier also pull all of their cargo or just the one shipment where the mis-declaration is discovered?

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VII. QUESTIONS

1. Are the current large vessels seaworthy for cargoes comprised of non-hazardous, known hazardous and unknown hazardous containers?
2. Vessel owners admit they do not know how many unknown hazardous containers they are putting on their vessel.
3. What due diligence have the vessel owner's undertaken to make their vessel's seaworthy when they are knowingly transporting un-declared hazardous cargo?
4. In light of past and recent court decisions and the current factual situation, how will a court rule when asked to determine if the vessel used due diligence to make the vessel seaworthy.



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